

## PART 1101—DESCRIPTION OF OFFICE, PROCEDURES, PUBLIC INFORMATION

Sec.

1101.1 Scope and purpose.

1101.2 Authority and functions.

1101.3 Organization and methods of operation.

1101.4 Disclosure of information, policies, and records.

1101.5 Testimony and production of documents in response to subpoena, order, etc.

AUTHORITY: 5 U.S.C. 552; 12 U.S.C. 3307.

SOURCE: 45 FR 46794, July 11, 1980, unless otherwise noted.

### § 1101.1 Scope and purpose.

This part implements the Freedom of Information Act (FOIA), 5 U.S.C. 552, with respect to the Federal Financial Institutions Examination Council (Council), and establishes related information disclosure procedures.

### § 1101.2 Authority and functions.

(a) The Council was established by the Federal Financial Institutions Examination Council Act of 1978 (Act), 12 U.S.C. 3301-3308. It is composed of the Comptroller of the Currency; the Chairman of the Federal Deposit Insurance Corporation; a Governor of the Board of Governors of the Federal Reserve System; the Chairman of the Federal Home Loan Bank Board; and the Chairman of the National Credit Union Administration Board.

(b) The statutory functions of the Council are set out at 12 U.S.C. 3305. In summary, the mission of the Council is to promote consistency and progress in federal examination and supervision of financial institutions and their affiliates. The Council is empowered to prescribe uniform principles, standards, and reporting forms and systems; make recommendations in the interest of uniformity; and conduct examiner schools open to personnel of the agencies represented on the Council and employees of state financial institutions supervisory agencies.

### § 1101.3 Organization and methods of operation.

(a) Statutory requirements relating to the Council's organization are stated in 12 U.S.C. 3303.

(b) *Council staff.* Administrative support and substantive coordination for Council activities are provided by a small staff detailed on a full-time basis from the five member agencies. The Executive Secretary and Deputy Executive Secretary of the Council supervise this staff.

(c) *Agency Liaison Group, Task Forces and Legal Advisory Group.* Most staff support in the substantive areas of the Council's duties is provided by inter-agency task forces and the Council's Legal Advisory Group (LAG). These task forces and the LAG are responsible for securing the services, as needed, of staff experts from the five agencies; supervising research and other investigative work for the Council; and preparing reports and recommendations for the Council. The Agency Liaison Group (ALG) is responsible for the overall coordination of the respective agencies' staff contributions to Council business. The ALG, the task forces, and the LAG are each composed of Council member agency staff serving the Council on a part-time basis.

(d) *State Liaison Committee.* Under 12 U.S.C. 3306, the Council has established a State Liaison Committee, composed of five representatives of state financial institutions supervisory agencies.

(e) *Council address.* Council offices are located at 1776 G Street, NW., Suite 701, Washington, DC 20006.

[45 FR 46794, July 11, 1980, as amended at 53 FR 7341, Mar. 8, 1988]

### § 1101.4 Disclosure of information, policies, and records.

(a) *Statements of policy published in the Federal Register or available for public inspection and copying; indices.* Under 5 U.S.C. 552(a)(1), the Council publishes general rules, policies and interpretations in the FEDERAL REGISTER. Under 5 U.S.C. 552(a)(2), policies and interpretations adopted by the Council, including instructions to Council staff affecting members of the public, and an index to the same, are available for public inspection and copying at the address set out in § 1101.3(e) of this part

during regular business hours. The preceding materials may be withheld from disclosure under the principles stated in paragraph (b)(1) of this section.

(b) *Other records of the Council available for public inspection; procedures*—(1) *General rule and exemptions.* Under 5 U.S.C. 552(a)(3), all other records of the Council are available for public inspection and copying, except those exempted from disclosure as provided in this paragraph. Except as specifically authorized by the Council, the following records, and portions thereof, are not available to the public:

(i) A record, or portion thereof, which is specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and which is, in fact, properly classified pursuant to such Executive order.

(ii) A record, or portion thereof, relating solely to the internal personnel rules and practices of an agency.

(iii) A record, or portion thereof, specifically exempted from disclosure by statute (other than 5 U.S.C. 552b), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(iv) A record, or portion thereof, containing trade secrets and commercial or financial information obtained from a person and privileged or confidential.

(v) An intraagency or interagency memorandum or letter that would not be routinely available by law to a private party in litigation, including, but not limited to, memoranda, reports, and other documents prepared by the personnel of the Council or its constituent agencies.

(vi) A personnel, medical, or similar record, including a financial record, or any portion thereof, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(vii) Records or information compiled for law enforcement purposes, including records relating to a proceeding by a financial institution's regulatory agency for the issuance of a cease-and-desist order, or order of suspension or removal, or assessment of a civil

money penalty and the granting, withholding, or revocation of any approval, permission, or authority, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source; (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual.

(viii) A record, or portion thereof, containing, relating to, or derived from an examination, operating, or condition report prepared by, or on behalf of, or for the use of any agency directly or indirectly responsible for the regulation or supervision of financial institutions, relating to the affairs of any financial institution or affiliate thereof, financial institution holding company or subsidiary, broker, finance company, or any other person engaged, or proposing to engage, in the business of operating, managing or controlling financial institutions.

(ix) A record, or portion thereof, which contains or is related to geological and geophysical information and data, including maps, concerning wells.

(2) *Waiver of exemption.* Notwithstanding the applicability of an exemption, the Council or the Council's designee may elect, under the circumstances of a particular request, to

disclose all or a portion of any requested record where permitted by law. Such disclosure has no precedential significance whatsoever.

(3) *Procedure for records request*—(i) *Initial request.* Requests for records shall be submitted in writing to the Executive Secretary of the Council, at the address set out in § 1101.3(e) of this part. Mailed requests should be marked “Freedom of Information Request,” “FOIA Request,” or the like on the envelope. Requests must reasonably describe the records sought. The Executive Secretary will aid members of the public in formulating their requests. All requests should give the complete telephone number of the individual seeking the records, if possible.

(ii) *Council response to initial requests.* The Executive Secretary will respond by mail to all properly submitted initial requests within 10 working days of receipt. The time for response may be extended up to 10 additional working days, as provided in 5 U.S.C. 552(a)(6)(B), or for other periods by agreement between the requesting party and the Executive Secretary.

(iii) *Appeals of responses to initial requests.* If a request is denied in whole or in part, the individual making the request may appeal in writing, within 35 days of the date of the denial, to the Chairman of the Council, at the address set out in § 1101.3(e) of this part. Mailed requests should be marked “Freedom of Information Appeal,” “FOIA Appeal,” or the like on the envelope. Appeals should refer to the date of the original request and the date of the Council’s initial ruling. Appeals should include an explanation of the basis for the appeal.

(iv) *Council response to appeals.* The Chairman of the Council, or another member designated by the Chairman, will respond by mail to all properly submitted appeals within 20 working days of receipt. The time for response may be extended up to 10 additional working days, as provided in 5 U.S.C. 552(a)(6)(B), or for other periods by agreement between the requesting party and the Chairman or the Chairman’s designee.

(4) *Procedure for access to records if request is granted.* When a request for access to records is granted, in whole or

in part, a copy of the records to be disclosed will be promptly delivered to the requesting party or made available for inspection, whichever was requested. Inspection of records, or duplication and delivery of copies of records will be arranged so as not to interfere with their use by the Council and other users of the records.

(5) *Fees for document search, review, and duplication; waiver and reduction of fees*—(i) *Definitions*—(A) *Direct costs* means those expenditures which the Council actually incurs in searching for, duplicating, and reviewing documents to respond to a FOIA request.

(B) *Search* means all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Searches may be done manually or by computer using existing programming.

(C) *Duplication* means the process of making a copy of a document necessary to respond to a FOIA request.

(D) *Review* means the process of examining documents located in response to a request that is for a commercial use (see § 1101.4(b)(5)(i)(E)) to determine whether any portion of any document located is permitted to be withheld and processing such documents for disclosure.

(E) *Commercial use request* means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

(F) *Educational institution* means a preschool, an elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(G) *Noncommercial scientific institution* means an institution that is not operated on a “commercial” basis as that term is referenced in § 1101.4(b)(i)(E), and which is operated solely for the purposes of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(H) *Representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term “news” means information that is about current events or that would be of current interest to the public.

(ii) *Fees to be charged.* The Council will charge fees that recoup the full allowable direct costs it incurs. The Council may contract with the private sector to locate, reproduce, and/or disseminate records. Provided, however, that the Council has ensured that the ultimate cost to the requester is no greater than it would be if the Council performed these tasks. Fees are subject to change as costs change. In no case will the Council contract out responsibilities which the FOIA provides that it alone may discharge, such as determining the applicability of an exemption, or determining whether to waive or reduce fees.

(A) *Manual searches and review.* The Council will charge fees at the following rates for manual searches for and review of records:

(1) If search/review is done by clerical staff, the hourly rate for GS-7, step 5, plus 16 percent of the rate to cover benefits;

(2) If search/review is done by professional staff, the hourly rate for GS-13, step 5, plus 16 percent of the rate to cover benefits.

(B) *Computer searches.* The Council will charge fees at the hourly rate for GS-13, step 5, plus 16 percent of the rate to cover benefits, plus the hourly cost of operating the computer for computer searches for records.

(C) *Duplication of records.* (1) The per-page fee for paper copy reproduction of a document is \$.25;

(2) The fee for documents generated by computer is the hourly rate for the computer operator (at GS 7, step 5, plus 16 percent for benefits if clerical staff, and GS 13, step 5, plus 16 percent for benefits if professional staff) plus the cost of materials (computer paper, tapes, labels, etc.).

(3) If any other method of duplication is used, the Council will charge the actual direct cost of duplicating the documents.

(D) If search, duplication and/or review is provided by personnel of member agencies of the Council, fees will reflect their actual hourly rates, plus 16 percent for benefits.

(E) *Fees to exceed \$25.* If the Council estimates that duplication and/or search fees are likely to exceed \$25, it will notify the requester of the estimated amount of fees, unless the requester has indicated in advance his/her willingness to pay fees as high as those anticipated. In the case of such notification by the Council, the requester will then have the opportunity to confer with Council personnel with the object of reformulating the request to meet his/her needs at a lower cost.

(F) *Other services.* Complying with requests for special services is entirely at the discretion of the Council. The Council will recover the full costs of providing such services to the extent it elects to provide them.

(G) *Restriction on assessing fees.* The Council will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself.

(H) *Waiving or reducing fees.* The Council shall waive or reduce fees under this section whenever disclosure of information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(I) The Council will make a determination of whether the public interest requirement above is met based on the following factors:

(i) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government;

(ii) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(iii) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to public understanding;

(iv) The significance of the contribution to the public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

(2) If the public interest requirement is met, the Council will make a determination on the commercial interest requirement based upon the following factors:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and if so

(ii) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large in comparison with the public interest in disclosure; that disclosure is primarily in the commercial interest of the requester.

(3) If the required public interest exists and the requester's commercial interest is not primary in comparison to it, the Council will waive or reduce fees.

(iii) *Categories of requesters.* (A) Commercial use requesters. The Council will assess fees for commercial use requesters which recover the full direct costs of searching for, reviewing for release, the duplicating the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents.

(B) Requesters who are representatives of the news media, educational and noncommercial scientific institution requesters. The Council shall provide documents to requesters in these categories for the cost of reproduction alone, excluding fees for the first 100 pages.

(C) All other requesters. The Council shall charge requesters who do not fit into any of the categories above fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without a fee.

(D) All requesters must specifically describe records sought.

(iv) *Interest on unpaid fees.* The Council may begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent. Interest will be at the rate prescribed in section 3717 of title 31 U.S.C. and will accrue from the date of the billing.

(v) *Fees for unsuccessful search and review.* The Council may assess fees for time spent searching and reviewing, even if it fails to locate the records or if records located are determined to be exempt from disclosure.

(vi) *Aggregating requests.* A requester(s) may not file multiple requests each seeking portions of a document or documents, solely in order to avoid payment of fees. If this is done, the Council may aggregate any such requests and charge accordingly. In no case will the Council aggregate multiple requests on unrelated subjects from the same requester.

(vii) *Advance payment of fees.* The Council will not require a requester to make an assurance of payment or an advance payment unless:

(A) The Council estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250. The Council will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(B) A requester has previously failed to pay a fee charged in a timely fashion. The Council may require the requester to pay the full amount owed plus any applicable interest as provided in § 1101.4(b)(5)(iv) or demonstrate that he/she has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the Council begins to process a new request or a pending request from that requester.

(C) When the Council acts under § 1101.4(b)(5)(vii) (A) or (B), the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 10 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial,

## § 1101.5

plus permissible extensions of these time limits) will begin only after the Council has received the fee payments described.

(6) *Records of another agency.* If a requested record is the property of another federal agency or department, and that agency or department, either in writing or by regulation, expressly retains ownership of such record, upon receipt of a request for the record the Council will promptly inform the requester of this ownership and immediately shall forward the request to the proprietary agency or department either for processing in accordance with the latter's regulations or for guidance with respect to disposition.

[45 FR 46794, July 11, 1980, as amended at 53 FR 7341, Mar. 8, 1988]

## § 1101.5 Testimony and production of documents in response to subpoena, order, etc.

No person shall testify, in court or otherwise, as a result of activities on behalf of the Council without prior written authorization from the Council. This section shall not restrict the authority of a Council member to testify before Congress on matters within his or her official responsibilities as a Council member. No person shall furnish documents reflecting information of the Council in compliance with a subpoena, order, or otherwise, without prior written authorization from the Council. The Council may authorize testimony or production of documents after the litigant (or the litigant's attorney) submits an affidavit to the Council setting forth the interest of the litigant and the testimony or documents desired. Authorization to testify or produce documents is limited to authority expressly granted by the Council. When the Council has not authorized testimony or production of documents, the individual to whom the subpoena or order has been directed will appear in court and respectfully state that he or she is unable to comply further with the subpoena or order by reason of this section.

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### PART 1102—APPRAISER REGULATION

#### Subpart A—Temporary Waiver Requests

Sec.

- 1102.1 Authority, purpose, and scope.
- 1102.2 Requirements for requests.
- 1102.3 Other requests and information submissions.
- 1102.4 Notice and comment.
- 1102.5 Subcommittee determination.
- 1102.6 Waiver extension.
- 1102.7 Waiver termination.

#### Subpart B—Rules of Practice for Proceedings

- 1102.20 Authority, purpose, and scope.
- 1102.21 Definitions.
- 1102.22 Appearance and practice before the Subcommittee.
- 1102.23 Formal requirements as to papers filed.
- 1102.24 Filing requirements.
- 1102.25 Service.
- 1102.26 When papers are deemed filed or served.
- 1102.27 Computing time.
- 1102.28 Documents and exhibits in proceedings public.
- 1102.29 Conduct of proceedings.
- 1102.30 Rules of evidence.
- 1102.31 Burden of proof.
- 1102.32 Notice of Intention to Commence a Proceeding.
- 1102.33 Rebuttal or Notice Not To Contest.
- 1102.34 Briefs, memoranda and statements.
- 1102.35 Opportunity for informal settlement.
- 1102.36 Oral presentations.
- 1102.37 Decision of the Subcommittee and judicial review.
- 1102.38 Compliance activities.
- 1102.39 Duty to cooperate.

#### Subpart C—Rules Pertaining to the Privacy of Individuals and Systems of Records Maintained by the Appraisal Subcommittee

- 1102.100 Authority, purpose and scope.
- 1102.101 Definitions.
- 1102.102 Times, places and requirements for requests pertaining to individual records in a record system and for the identification of individuals making requests for access to records pertaining to them.
- 1102.103 Disclosure of requested records.
- 1102.104 Special procedure: Medical records.
- 1102.105 Requests for amendment of records.
- 1102.106 Review of requests for amendment.
- 1102.107 Appeal of initial adverse agency determination regarding access or amendment.
- 1102.108 General provisions.